COM/I-84-034-JL

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF COMMERCE

In the Matter of the insurance Agent's License of Ross Henry Dworsky and In the Matter of Dworsky Agency, Inc.. RECONSIDERATION

ORDER ON MOTION FOR

The above-entitled matter is before the undersigned Administrative law Judge pursuant to a Notice of and Order for Hearing filed April 4, 1984, and an amended Notice of and Order for Hearing filed May 8, 1984.

On April 24, 1984, Frank R. Berman, Attorney at Law, 1336 TCF Tower, Minneapolis, Minnesota 55402, counsel for the above-named Respondents, filed a Motion to Suppress Certain Evidence on the grounds that the Department had obtained that evidence in violation of the Respondent's rights under the Fourth Amendment. John C. Bjork, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, counsel for the Minnesota Department of Commerce (Department) objected to that Motion and a briefing schedule was established. on June 1, 1984, the Administrative Law Judge issued an Order suppressing the evidence obtained during the Department's search of the Respondent's business office. On June 12, 1984, the Department filed a motion for Reconsideration of that Order or its certification to the Commissioner for review. The Respondents have objected to that Motion and both parties have filed Briefs on the issues. The last Brief having been filed by the Respondents on July 13, 1984.

NOW, TTHEREFORE, based on all the proceedings herein including the arguments of counsel and the conclusions contained in the attached Memorandum,

IT IS HEREBY ORDERED:

1. that the Respondents' Motion to suppress any evidence obtained as a result of the Department's search of their business records on December 13, 1983, is granted.

2. That this Order and its predecessor are hereby certified to the Commissioner of the Minnesota Department of Commerce.

Dated this 14th day of August, 1984.

JON L. LUNDE
Administrative Law Judge

MEM0RANDUM

In this case it is necessary to reconsider the Order previously issued. Since the Department's search and seizure of the Respondent's records was not made pursuant to a search warrant, it was authorized, if at all, by the Respondent's consent, the Department's subpoena or the Department's statutory rights. those issues are reconsidered herein.

the Department argues that the Respondents Consented to the search and seizure. the Respondents argue that they didn't. Their respective affidavits reflect the some disagreement. In view of that factual dispute, it is concluded that an evidentiary hearing on the consent issue is preferable to the resolution of those factual disputes on the basis of the affidavits submitted. consequently, on reconsideration, the finding of a non-consentwal search is withdrawn and reserved pending the Ccmmissioner's review of this Order.

Subpoena

the Department's subpoena, as a subpoena, absent the Respondents consent to a search, did not authorize a search and seizure of the Repondents business records. it is well settled that a subpoena duces tecum does not authorize a search and seizure of the documents listed in it. Mancuzi v. DeForte, 292 U.S. 364, 88 S.Ct. 2120, L.Ed. 2d (1968). Even if the subpoena requires the surrender of documents forthwith, the person armed with such a subpoena is not authorized to seize the specified documents or demand their immediate surrender under threats of arrest. See, e.g., U.S. v. Allison, 619 F.2d 1254 (8th Cir. 1980); Consumer Credit Insurance Agency v. The United states, 599 F.2d 770 (6th Cir. 1979 ; In re Nwamu 421 F. Supp. 1361 (S.D.N.Y 1976); and United States v. Re 313 F.Supp. 442, 448 (S.D.N.Y. 1970). Based on the holdings in these cases it is clear that the Department's subpoena, as a subpoena issued under its statutory subpoena cower, and absent the Respondents consent to the search and seizure of their business records, did not authorize the search and seizure which occurred.

Therefore, in the absence of such consent, the Department's search and seizure was authorized only if the Department had a statutory right to undertake a non-consentual search and seizure without a warrant. Whether the

Department had such a statutory right is the major issue in this case.

Statutory Rights of the Department

the Department argues that Minn. Stat. sec. 60A.031, authorized its search and seizure of the Respondents records. The Respondents argue that the statute does not apply to insurance brokers. They also argue that if the statute does apply, it permits only searches and not seizures. In addition, the Respondents argue that the search in this case was unauthorized because the Department did not follow the statutory procedural requirements for a search.

Minn. stat. sec. 60A.031, subd. 1, pertaining to certain examinations by the Commissioner provides in part as follows:

> subdivision 1. Power to examine. (1) insurers and other licensees. At any time and for any reason related to the enforcement of the insurance laws, the commissioner Pay examine the affairs and conditions of any foreign or domestic insurance company, including reciprocals and fraternals, licensee or applicant for a license under the insurance laws, or any other person or organization of persons doing or in the process of organizing to do any insurance business in this state, and of any licensed advisory organization serving any of the foregoing in this state.

The Department argues that the cited language unequivocally authorizes the Commissioner to examine the affairs and conditions of a licensed insurance agent or broker. in its view, the language is unambiguous and may not be construed. Specifically, the Department argues that insurance brokers are included within the words 'licensee' and 'any other person or organization of persons doing or in the process of organizing to do any insurance business in this state'. Since the Respondents are licensed by the state, or persons doing insurance business in the state, the Department concludes that their examination is clearly authorized.

However, the word 'including', and the words 'insurance business"-- which are not defined in the statute-- are ambiguous and require interpretation. The word "including' has a variable meaning. Sometimes it is a word of enlargement and at other times it is a word of restriction. Thus, it may be used to specify particularly that which belongs to a class already mentioned in Pore general terms. On the other hand, it may be used to add to a class a genus not naturally belonging to It. Lowry v City of Mankato, 42 N.W.2d 553, 559 (Minn. 1950); 42 C.J.S., Include, pp. 526-527. Therefore, the words including reciprocals and fraternals, licensee or applicant for a license wider the insurance laws, or other person or organization of persons doing or in the process of organizing to do any insurance business in this state" are ambiguous. the word "licensee" may simply be a reference to the class already mentioned in Pore general terms-- i.e., foreign or domestic insurance companies- or it may add a new class of persons over whom the Commissioner has a power to examine. The Administrative Law Judge initially construed the

word "licensee' as a more specific reference to foreign and domestic insurance companies. Under such a construction the Commissioner would have power to examine a foreign or domestic insurance company whether it was licensed or had merely applied for a license. Similarly, the words 'or any other person or organization of persons doing or in the process of organizing to do any insurance business in this state' would again be a more particular reference to foreign and domestic insurance companies. Thus, if the word "including" is interpreted as referring to specific members of the class already mentioned in more general terms (foreign and domestic insurance companies), Subdivision 1, as cited above, would apply only to foreign and domestic insurance companies. 'We statute would apply to them if they are reciprocals and fraternals; if they are licensed, or merely applicants for licensure; or if they are conducting business or organizing to do business in this state, even though they are not licensed and have not applied for a license. That construction, as was previously mentioned, is more consistent with the statute when read as a whole -

the Department has also argued that the words 'insurance business' apply to insurance agents and brokers. However the words are not defined in the statute. They could mean the business conducted by an insurance company which underwrites and indemnities another person for loss or could be given a broader interpretation to apply to independent insurance agents, adjusters or investigators. Generally speaking, the words 'insurance business' have been construed to mean the business of accepting risks or underwriting losses. See, e.q. , Piedmont Life ins. Co. v. Bell, 109 Ga.App. 251, 135 S.E.2d 916, 923 (1964) and 44 C.J.S., Insurance sec. 59. The Department has argued that the commissioner's authority should be broadly construed and that the Legislature should be presumed to favor the public interest over any private interest. where Fourth Amendment rights are involved, however, a strict construction is more appropriate. See, 79 C.J.S., Searches and Seizures SS 7 and 71.

The Department also argues that the legislative history of S 60A.031 and the agency'S contemporaneous administrative interpretation of the statute support its argument that insurance agents are covered by it. There is no legislative history in the record which indicates that insurance agents were intended to be covered by S 60A.031. The mere fact that the Legislature has enlarged the Commissioner's powers regarding investigations does not mean that it intended to authorize inspections of insurance agents. It is true, however, that agency interpretations of the statutes they are required to enforce is subject to deference. The Department argues that the 1981 amendments to S 60A.031 were sponsored by the Department and its interpretation should be controlling here. The agency's contemporaneous construction of the statute cannot be ignored, but it is not determinative of a proper construction of the statute where the no rules have been adopted implementing or interpreting the statute and where the Commissioner himself has never addressed the matter in a contested case proceeding. Since the Administrative law Judge believes that the staff's construction of the statute is overly broad, he is compelled to recommend that the Commissioner adopt a more narrow interpretation.

The Department also argues that the Legislature intended to effect a change in the law when it amended Minn. Stat. S 60A.031 in 1981 and that if that section is construed not to include insurance agents the words 'licensee"

and "any other person' are superfluous. Neither argnment is persuasive. The 1981 amendments to the law clearly expanded the Commissioner's authority. Moreover, the words ,licensee' and 'any other person' are not made superfluous if construed so as not to apply to insurance agents. As was noted, the word 'licensee" in S 60A.031, subd. 1 (1) refers to foreign or domestic insurance companies that are licensed. It is merely a reference used to distinguish foreign or domestic insurance companies which are licensed from those who have merely applied for a license. Likewise, the words 'any other person' are not superfluous. They refer to persons operating as insurance companies without a license and to those persons organizing to do so.

For these reasons, as well as those set forth in the initial order and memorandum and in the Respondents arguments and briefs, it is concluded that Minn. Stat. S 60A.031, subd. 1 (1) was not intended to apply to insurance agents. on the contrary it applies to foreign and domestic insurance companies whether they are licensed, applicants for a license, doing business without a license or in the process of organizing to do business in the

state. The statute does not mention insurance agents and the statute taken as a whole and the absence of any contrary legislative history persuade the administrative Law Judge that insurance agents were not intended to be covered. 'We Commissioner should not construe it to add a class of persons the Legislature did not intend to include.

if 60A.031 does not authorize access to the books and records of an insurance agent, absent the Respondents consent to the examination which took place in this case, that examination and the seizure of the Respondent's business documents would be an unauthorized and unreasonable search and seizure for purposes of the Fourth Amendment. For the reasons stated in the initial Cider, it is concluded that such an unreasonable search and seizure would require the Department to return those records and require their suppression as evidence. However, if the Commissioner finds that S 60A.031 does authorize access during normal business hours to the books and records of an insurance agent, two additional issues must be resolved. First, whether the subpoena issued is a legally acceptable surrogate for the order for examination required by Minn. Stat. S 60A.031, subd. 2a.; and second, whether the authority to have access to the Respondent's business records authorizes their seizure.

the subpoena issued by the Department specifically refers to Minn. Stat. sec. 60A.031 as containing a potential penalty for the Respondents refusal to comply with, it. It names the Commerce Department's investigators to whom the files described were to be delivered and is signed by the deputy Commissioner of Cammerce. Therefore, the Department has argued that its issuance of a subpoena rather than an order is immaterial. That is not persuasive. An order for examination authorizing an investigator's access to business records is substantially different from a subpoena which merely requires the person named therein to deliver records at a time and place specified. Use of a subpoena rather than an order is confusingl to the person served and different penalties may be imposed for non-compliance. The difference is similar to the differences between a search warrant and a subpoena. The courts, as noted above, have consistently held that a subpoena does not authorize the search and seizure of business records. See, e.g. Mancuzi v. DeFore, supra; U.S. v. Allison, supra; in re Nwamu, supra. For that reason it is concluded that the Department's subpoena did not authorize its investigators to have access to the Respondents records. Proceedings for the issuance of search warrants are strictly construed and all formalities for their issuance must be met. 79 C.J.S., Searches and Seizures S 71. The same rule is applied to administrative subpoenas. Wilson & Co. Inc. v. Oxberger 252 N.W.2d 687 (Iowa 1977). The same strict construction

here. Doing so requires that the subpoena be invalidated as an order for investigation and access.

1 Forthwith subpoenas themselves are suspect. Consumer Credit Insurance Agency v. United States, 599 F.2d 770 (6th Cir. 1919). The Minnesota Supreme Court has implied that the person served must have an opportunity to challenge them in court. Roberts v. Whitaker, 287 Minn. 452, 178 N.W.2d 869 (1970). No such right exists as to an order for investigation. Hence, use of a forthwith subpoena as an order puts the person served in a quandry regarding his right to seek judicial relief.

Similarly, S 60A.031 nowhere authorizes the seizure of records. in two cases courts have approved the seizure of records required to be maintained even though the underlying statutes only gave the investigators the right to inspect those records and did not specifically permit their seizure. See, People v. Curco Drugs Inc. 76 Misc.2d 222, 227 350 N.Y.S.2d 74, 80 (1973) and United States ex. rel Terraciano v. Montanye 493 F.2d 682 (2nd Cir. 1974 ) . In those cases, unlike this case, the records seized were required by law to be kept. Since there is no showing here that the records seized by the Department's investigators were records the Respondents were required to keep, it is concluded that the cited cases are inapplicable and that the Department had no implied authority to seize them. Where the documents seized are not required by law to be maintained a person's expectations of privacy are substantially different than where the records are required by law. For that reason, and because individual citizens should not be deprived of precious constitutional rights by implication, it is concluded that the seizure of the Respondents records was unauthorized. If the statute is applicable to the Respondents, it must be strictly construed. 79 C.S.J., Searches and Seizures S 7. A strict construction does not permit an implied power to seize. Tnerefore, absent the Respondent's consent to their removal, the removal violated the Fourth Amendment and requires that those records be returned and that any evidence obtained should be suppressed.

In his original Order, the Administrative law Judge concluded that if the Respondent failed to give his consent to the search and seizure, the Department's investigators were without authority to continue with their insoection. On reconsideration, it is concluded that ansent consent an inspection would be permissible had an appropriate order been issued so long as it was not forcible. In this case no direct force was used in conducting the examination. therefore, if S 60A.031 is applicable to Respondents, and if the subpoena was an appropriate surrogate for an examination order, Departmental investigators would have been authorized to proceed with their examdnation of Respondents business records, but not to seize them, so long as that examination did not require the use of force.

For the reasons set out in the original Order, it is concluded that suppression of the evidence seized by the Department is required. In its Motion for Reconsideration the Department has argued that suppression is inconsistent with United States v. Leon, 44 CC?: S.Ct.Bull.p., B4929 and Nix v. Williams, U.S. , 104 S.Ct. 2501 (1984). Chose cases are na applicable In Leon, it was held that an officer's good faith reliance on a magistrate's search warrant would not generally invalidate a search made under it, even if the magistrate erred in issuing the warrant. In this case, no search warrant was issued and no magistrate was involved. While an officer can rely on a search warrant issued by an impartial magistrate or judge, reliance on an administrative subpoena to search records, without the authorizing order required by statute, and without authority to seize, is not entitled to the same treatment.

In Nix, the court held that an officer's violation of a defendant's Sixth Amendment rights would not preclude the introduction of evidence which would have been discovered anyway. In that case, the evidence consisted of the condition and location of a murdered person's body. Toe Department argued

that since the documents taken from Respondents would have been discovered anyway--- by enforcing the subpoena in court-- the evidence revealed by those documents is admissible under the Nix holding. Such a construction and application of the holding in the Nix case would make a mockery of the Fourth Amendment . If that was the law, agencies could search and seize at their pleasure so long as they have subpoena power. That result is inconsistent with the Fourth Amendment and mist be rejected.

Certification

The issues raised in this case are important and novel ones for which there is little precedent in contested case proceedings or decisions of the Minnesota Supreme Court. Not only are important constitutional rights involved but equally important rights of the Department of Commerce to carry out its administrative duties in regulating insurance companies and insurance agents and brokers. Moreover, since the applicability of S 60A.031 is in issue, the Administrative Law Judge concludes that certification is appropriate here. The certification of motions to an agency is governed by Minn. Rile 1400.7600. Under that rule, the Administrative Law Judge, in deciding whether to certify a motion, must consider whether the motion involves a controlling question of law as to which there is substantial ground for difference of opinion, whether a final determination by the agency would materially advance the ultimate termination of the hearing and whether it is necessary to promote the development of the full record and avoid remanding. those factors are all applicable here. The scope and coverage of Minn. Stat. 5 60A.031 does involve a controlling question of law upon which there is a substantial ground for difference of opinion. Moreover, resolution of that issue is one the Commissioner should make since he has the final authority to determine the scope of his authority and the proper interpretation of the statutes he must administer. A final determination by the commissioner on this motion will materially advance the ultimate termination of the hearing and will promote the development of a proper record without the necessity for a future remand if certain evidence is excluded. For these reasons, it is concluded that certification of the Respondent's motion and this order is appropriate.

In sum, it is concluded that Minn. Stat. S 60A.031, subd. l(l) does not apply to insurance agents and that the Commissioner does not have free access during normal business hours to the books and records of an insurance agent under it. For that reason, absent consent to the search and seizure involved in this case, it was unauthorized and any evidence obtained therefrom must be suppressed. Even if the Commissioner determines that sec. 60A.031, subd. l(l) does apply to insurance agents, it is concluded that the subpoena issued is not a legally acceptable surrogate for an order for examination, and even if it was, that the subpoena and the commissioner's right of access did not authorize the seizure of the Respondent's business records. since an improper seizure did occur, those records should be returned to the Respondents and any evidence gained as a result of the seizure must be suppressed.

J. L. L.